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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936

No. 138

KENTUCKY WHIP AND COLLAR COMPANY,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

BRIEF OF AMICI CURIÆ.

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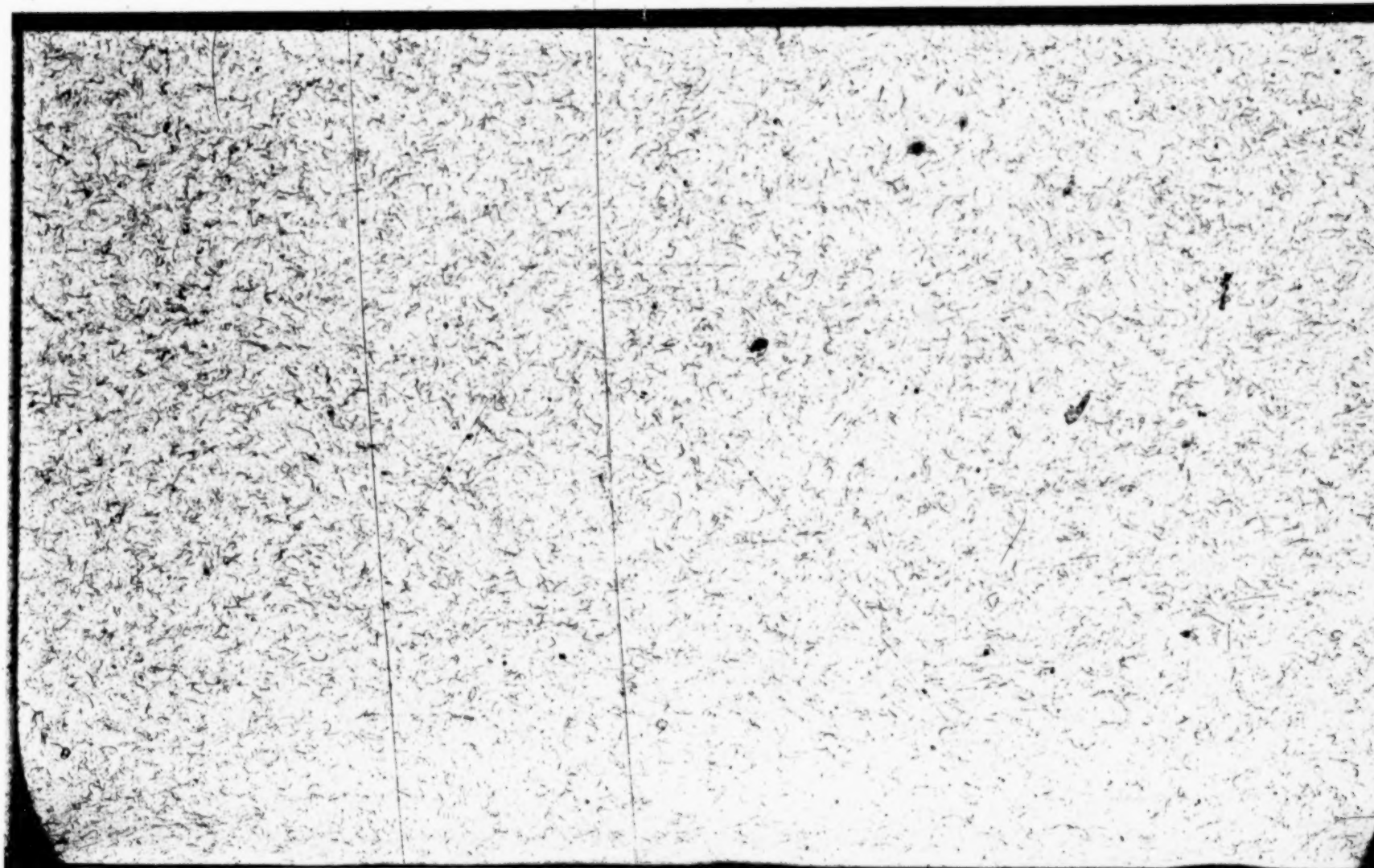

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KENTUCKY WHIP AND COLLAR COMPANY,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

The undersigned are counsel for the Cordage Institute and the American Federation of Labor, both of whom have an interest in the outcome of this litigation as extensive as the parties thereto.

The Cordage Institute is a trade association composed of the manufacturers of a major percentage of hard fiber cordage and twine products manufactured in private factories in the United States, with plants located throughout the country, and whose investment and whose thousands of employees have been, are, and will continue to be

affected by the operation of the Act, the validity of which is here questioned.

The American Federation of Labor, representing the organized working men and women of the United States has a vital concern in the effect and operation of the Act here questioned, in that it bears directly upon a subject matter of interstate commerce affecting its members.

BRIEF OF AMICI CURIÆ.

OPINIONS OF COURTS BELOW.

The opinion of the District Court of the United States for the Western District of Kentucky (R. 29) is reported in 12 Fed. Supp. 37.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 52) was rendered June 1, 1936, and is reported in 84 F. (2d) 168.

JURISDICTION.

The petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit was filed June 29, 1936, and allowed October 12, 1936. The jurisdiction of this Court is invoked under the provisions of Sec. 240 of the Judicial Code as Amended (Sec. 347, Title 28, U. S. C. A.).

QUESTION PRESENTED.

Whether the Act of Congress entitled "An act to prohibit the interstate transportation of prison-made products in certain cases," approved July 24, 1935, (49 Stat. 494; 49 U. S. C. A., Secs. 61-64), commonly known as the **Ashurst-Sumners** Act, and providing that it shall be unlawful to transport or cause to be transported, goods made by convict-labor into any state where the same are intended to

be used or sold in violation of the law of such state, and requiring that packages containing convict-made goods when shipped in interstate commerce be marked to show the name and address of the shipper, the nature of the contents, and the name and location of the institution where produced, is violative of the Constitution of the United States, as exceeding the power of Congress to regulate commerce among the states.

STATUTE INVOLVED.

The statute under attack in this case is set out in full in Appendix I hereto.

STATEMENT OF THE CASE.

The petitioner brought its bill in the District Court of the United States for the Western District of Kentucky alleging that it is engaged in the manufacture, with the labor of convicts confined in the Kentucky State Penitentiary at Eddyville, Kentucky, of horse collars and strap goods, and that it has built up a large and valuable business in the sale of such products **to the trade** throughout the United States; that on August 13, 1935, in fulfillment of certain **bona fide** orders theretofore received it tendered to the respondent railroad company several separate shipments of horse collars and strap goods manufactured with prison labor, for the purpose of having the shipments transported to the consignees thereof, each of whom was located in a state other than Kentucky. The respondent company refused to accept said shipments because prohibited by the Act of Congress referred to above.

Several of the shipments tendered were consigned to customers in states whose laws prohibit the sale of any goods, wares or merchandise manufactured or produced, wholly or in part, by convict labor. Certain of the shipments were

consigned to customers in states whose laws require that any convict-made goods sold or offered for sale be plainly marked so as to indicate the fact that they are convict-made. The names of these customers would indicate that they are dealers in and resellers of the articles so consigned. Certain of the shipments were consigned to states whose laws impose no restrictions whatever upon the sale of convict-made goods.

There is no allegation in the bill that any of the packages containing said convict-made goods and tendered for shipment were marked as required by Section 2 of the Act.

The petitioner sought a mandatory injunction requiring the railroad company to accept and transport each of the shipments tendered, and to accept and transport all future shipments of a similar character, and an order restraining the railroad company from refusing to accept and transport all shipments of convict-made goods which may be tendered it by the petitioner, and asked for a binding declaration of rights as between the petitioner and respondent, decreeing and adjudging said Act of Congress to be invalid as violative of the Constitution of the United States (R. 1-23).

A motion to dismiss the bill was filed by the respondent herein, the principal grounds of which were that the bill of complaint set forth no facts which would entitle the plaintiff to the relief sought; that the act of Congress complained of is constitutional and affords no basis for the relief sought by petitioner; and that the bill of complaint on its face shows a lack of equity (R. 24).

By stipulation (R. 25) the case was submitted upon this motion, and a preliminary injunction was issued August 26, 1935 (R. 26).

The facts, as found by the District Court are substantially as alleged in the bill, except that the Court found that the products of the petitioner are not in themselves harmful to the health, peace or good order of the communities

into which they are shipped, or in which they are used (R. 41).

Petitioner filed a motion for an additional finding of fact (R. 43) that the articles involved are not in and of themselves, in any particular, harmful to the general welfare of the communities into which they are shipped, which motion was overruled (R. 43).

The District Court found as its conclusions of law that the petitioner had no adequate remedy at law; that the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those states which prohibit the sale or possession of such goods is invalid and beyond the constitutional power of Congress; that the Act in so far as it prohibits the shipments of convict-made goods into states which require that such goods shall be labeled so as to indicate the fact, before being sold or offered for sale, unless such goods are so labeled before interstate shipment, is a valid exercise of the power of Congress under the Constitution; that Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, before shipment, be so labeled as to indicate that the contents are convict-made, together with the name and location of the prison where made; that Section 2 of the Act is separable, valid and enforceable; that the portion of Section 1 which operates to prohibit shipment of unlabeled convict-made goods into those states prohibiting their exposure for sale, or sale, unless so labeled, is separable from the other part of Section 1 of the Act, and is valid and enforceable; that the petitioner did not label the articles tendered to the respondent for shipment to those states requiring convict-made articles to be labeled before sale or exposure for sale; that the respondent was not required to accept such shipments and to transport same to their destination; that the petitioner did not mark any of the contain-

ers of any of the shipments enumerated in the bill as required by the Act, and therefore the respondent was not required to accept any of such shipments or transport the same (R. 41-42).

The petitioner's bill was accordingly dismissed at its cost, and the preliminary injunction theretofore issued was continued in force pending an appeal (R. 42). The petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit and that Court held the entire Act to be constitutional and affirmed the decree of the District Court dismissing the bill (R. 51). It is asserted by the petitioner that the **Ashurst-Sumners** Act is violative of the Constitution of the United States in that it is not a valid exercise of the power of Congress to regulate commerce among the States; that it contravenes the Fifth and Tenth Amendments to the Constitution of the United States; and that it attempts to delegate to the several States the prohibition and regulation of interstate commerce.

ARGUMENT.

I.

THIS COURT HAS REPEATEDLY CONSIDERED CONDITIONS CONFRONTING CONGRESS WHEN PASSING UPON ITS ACTS TO MEET THOSE CONDITIONS.

In determining the questions presented in this case we inquire first as to the occasion for the legislation and its history.

Nebbia v. New York, 291 U. S. 502, 515, 78 L. ed. 940, 944;

United States v. Anderson, 9 Wall. 56, 65, 19 L. ed. 615, 617;

Costanzo v. Tillinghast, 287 U. S. 341, 345, 77 L. ed. 350, 353.

We must look to contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative bodies to determine the evil which it is designed to remedy.

United States v. Union Pacific R. Co., 91 U. S. 72, 79, 23 L. ed. 224, 228;

United States v. Laws, 163 U. S. 258, 262, 41 L. ed. 151, 153;

United States v. Missouri Pacific Railroad Co., 278 U. S. 269, 278, 73 L. ed. 322, 377.

In 1929 the Congress passed an Act entitled "An Act to divest goods, wares and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases", and known as the **Hawes-Cooper** Act (45 Stat. 184; 49 U. S. C. A., Sec. 65), which provided that all goods, wares and merchandise manufactured or produced by convict labor, or in any penal institution, and transported into any state and remaining therein for use, consumption, sale or storage, shall upon arrival and delivery in such state be subject to the laws thereof, to the same extent and in the same manner as though such goods had been produced in such state. The act became effective on January 19, 1934, five years from the date of its approval.

The reasons which impelled the passage of that Act by the Congress have so recently been considered by this Court in the case of **Whitfield v. Ohio**, 297 U. S. 431, 80 L. ed. 527, that it is unnecessary to review them here. It is sufficient to say that at the time of its consideration of the **Ashurst-Sumners** Act the Congress had before it information disclosing a continued and substantial increase in the production and interstate sales of prison-made goods, notwithstanding the previous passage by twenty-one states of laws prohibiting such sales. The United States Department of

Labor issued a report giving the result of a survey of the extent and character of prison labor in the United States in 1932. (Bureau of Labor Statistics, Bulletin No. 595.) This document, issued in 1933, covers the period midway between the approval of the **Hawes-Cooper** Act and its effective date. It shows that goods in the value of approximately $28,000,000 were manufactured in State prisons and sold in the open markets of the country, and that 65.7 per cent (as against 58 per cent in 1923) of such goods were sold outside the State where produced, thereby imposing upon certain unwilling states most of the financial burden of the administration of the penal institutions of those states whose prison goods were sold in interstate commerce.

It was also disclosed in this report that **the Kentucky prisons in 1932 produced goods in the value of $3,006,763, of which there were sold outside the state, goods totaling in value $2,738,902.** It was also shown that in all the prisons of the country 82,000 prisoners were engaged in productive employment in 1932, as against 51,000 prisoners so engaged in 1923; that more than 19,000 prisoners were engaged in the production of clothing alone in 1932, as against 10,000 in 1923.

More than 19,000,000 work shirts (as against 13,800,000 in 1923) were manufactured in prisons and sold in the open market in 1932 in competition with approximately 62,000,000 work shirts made by free labor; 7,000,000 pairs of pants were produced in prisons and sold upon the open market in competition with 27,000,000 pairs of work pants made in private factories for the same year and, in addition, some 640,000 pairs of overalls were produced in prison factories during the same period. In 1923, the prisons produced only 3,000,000 pairs of pants. There were sold upon the open market in 1932 more than 3,000,000 brooms in competition with private broom factories, in which the blind were very widely employed. As against 61,000,000

pounds of twine and rope produced by prisons in 1923, more than 63,000,000 pounds of binder twine alone were so produced in 1932, and sold in competition with 158,000,000 pounds of such twine produced by private industry with free labor. This latter figure is to be compared with more than 240,000,000 pounds sold by free industry in 1923. In addition to the binder twine more than 3,500,000 pounds of rope made by prisons went into competition with rope produced by private industry in 1932.

The report disclosed that in 1932 approximately 4,000,000 suits of underwear were made in prisons for sale on the open market, as against approximately 15,000 in 1923; that prisons produced for sale in the open market in 1932 approximately 1,500,000 children's play suits as against 919,000 in 1923; that in 1932 there were produced by the prisons for sale approximately 2,000,000 dresses; while it is not shown that any were produced in 1923; that in 1932 approximately 800,000 wood chairs were produced in prisons for sale in the general markets as against 400,000 in 1923. Many other items might be mentioned but these are sufficient to show the trend of prison production which concerned the Congress when it came to consider the problem.

The Congress in its consideration of the Act in question here also had the benefit of another and more recent investigation conducted by order of the President of the United States. On October 12, 1934, almost nine months after the effective date of the **Hawes-Cooper** Act (upon which date also became effective the statutes of many of the states prohibiting the sale of prison-made goods) the President appointed a special committee and directed it to make an investigation with respect to the competition of the products of prison labor with the products of the cotton garment industry. (Order No. 118-135.) This committee on November 26, 1934, made public its report, after a

thorough investigation of the effect of the sale in the commerce of the United States of convict-made goods. The Committee in its conclusions stated:

> "The only true solution of the prison labor problem is one that will effectually remove the products of prison labor from the ordinary channels of competitive trade and commerce."

And again:

> "For many years penal institutions have emphasized the production of cotton garments under a contract system and have marketed their products at prices which outside shops found difficult to meet. Prison labor competition made the maintenance of any standards in the industry outside progressively difficult, and forced the manufacturer into out-of-the-way places where child labor, night work, long hours, and poor pay became the rule. It has been impossible in the past for the industry to achieve stability, to increase its wages, or to improve its wages, or to improve its standards, because of the lower costs of prison manufacture. The prison contractor had the advantages of free rent, light, and heat, of low labor costs, and of a controlled labor force—there is ample evidence in the history of prison contracting that the disciplinary machinery of the institutions was often used to inflict physical punishment upon the prisoner who failed to complete his alloted task. The prison contractor supplied work for the prisoners and in one way or another added emoluments to the agents of the State who were participants in the execution of the prison labor contract. The system served the contractor and the prison administration. It was, however, in many instances a bane and a curse in the lives of the prisoners, and the low-priced products kept wages down and the standard of living below a decent level for the workers outside."

* * * * * * *

> "It is clear that the attitude of the Government, as expressed through Congressional action and through

the reports of commissions, has been that it is undesirable social policy to promote profit-making industries in penal institutions."

That the Senate Committee on the Judiciary, which reported the **Ashurst-Sumners** bill in the Senate, had in mind the purpose of **aiding the states** in the enforcement of their laws enacted subsequent to the passage of the **Hawes-Cooper** Act, is evident from the language of its report. It was said:

"For many years the Congress has considered bills relating to the sale of prison-made goods. Extensive hearings have been held on these measures which have thoroughly revealed **the evils attending the sale of such goods in the open market**, in competition with goods manufactured and produced by free labor. These evils impelled the Congress in 1929 to enact the **Hawes-Cooper** law, by virtue of which prison-made goods upon their entry and delivery into a state, became subject to the laws of that State.

"**At present 21 States, with a population in excess of 75 millions, have enacted laws prohibiting the sale, in the open market, of prison-made goods.** This bill is designed to prohibit the transportation of such goods into the States which have thus legislated, in cases in which such goods are to be received or used in violation of the State law. The principle involved in this bill has been frequently sustained by the Supreme Court of the United States. Consequently, the members of the committee believe beyond the peradventure of a doubt that the bill is constitutional." (Report No. 906 U. S. Senate, 74th Congress, 1st Session). (Boldface ours.)

Thirty states representing a population of more than 90,000,000, **now** have statutes prohibiting the sale of prison-made goods within their borders, or requiring that all such goods offered for sale be marked or labelled to show the fact that they are prison made.

But notwithstanding the various state laws, dealers in prison-made goods continued to sell them in constantly increasing quantities **in violation of such laws.** The Bill of Complaint of the petitioner herein not only shows that it has been a party to such violations, but that it expects to continue to do so. It clearly demonstrates the necessity for the law which is under attack here.

The Ashurst-Sumners Act was adopted to prevent the exclusive power of Congress over interstate commerce from being used as a cloak for the introduction of prison made goods into those states which have legislated to preserve their policies from impairment or defeat by declaring the sale of prison made goods injurious to the public welfare, and therefore unlawful, a declaration which a state "has the right and power, so far as the federal Constitution is concerned" to make. **Whitfield v. Ohio, Supra.**

II.

THE VALIDITY OF STATE LAWS PROHIBITING THE SALE OF CONVICT MADE GOODS ON THE OPEN MARKET HAS BEEN SETTLED.

In the case of **Whitfield v. Ohio, Supra,** this court had under consideration the validity of Secs. 2228-1 and 2228-2 of the General Code of Ohio, which prohibits the sale of convict made goods upon the open market in that state, and also the validity of the **Hawes-Cooper** Act. Substantially the same arguments were advanced by the petitioner in that case against the validity of those statutes as are advanced by the petitioner here against the **Ashurst-Sumners** Act. The issue was determined adversely to the contentions of the petitioner, and both the Ohio statute and the Act of Congress were sustained as proper enactments.

In that case this court said:

> "As interpreted by the Court below, the laws of Ohio passed in pursuance of the State Constitution **prohibit**

> **the sale in the open market** of goods made in Ohio by convict labor. The statutory provision here challenged enforces, without discrimination, the same rule as to the convict-made goods of **other states when they are brought into Ohio**; and the contention in respect of the privileges and immunities clause must be rejected as without substance." (Boldface ours.)

And with specific reference to the right of a state to enact such legislation this court said:

> "All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. **A state** basing its legislation upon that conception **has the right and power, so far as the federal Constitution is concerned,** by non-discriminating legislation, **to preserve its policy from impairment or defeat, by any means appropriate to the end** and not inconsistent with that instrument. The proposition is not contested that **the Ohio statute would be unassailable if made to take effect after a sale in the original package. And the statute as it now reads is equally unassailable,** since Congress has provided that the particular subjects of interstate commerce here involved 'shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case', In Rahrer, supra, p. 562, namely upon arrival and delivery." (Boldface ours.)

Notwithstanding the fact that several pages of the Petitioner's brief are devoted by the learned counsel ~~for appellant~~ to the argument that much of the opinion of the Supreme Court in the *Whitfield* case is *dicta*, the paragraph of the opinion just quoted unequivocably establishes, in language so clear that it cannot be misinterpreted, the power of a state to prohibit the sale of prison-made goods upon the open markets thereof.

It follows that if a state has the right and power to prohibit the sale of, or traffic in prison-made goods, it has the right to exercise a lesser degree of that power and require only that prison-made goods when offered for sale within its jurisdiction be labeled as such. Otherwise, we should be faced with the contradiction in terms that because the legislature "had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power." **James Clark Distilling Company v. Western Maryland Railroad Company**, 242 U. S. 311, 331, 61 L. ed. 332, 340.

The only object in failing to place a label upon convict-made articles, or in attaching a misleading label to the same is to make it appear that such goods were produced in a factory where they were not actually produced, or by labor by which they were not actually produced, thus inducing unwary purchasers to buy them as and for articles produced by free labor in a free industrial plant.

That the public has a right to be fully advised as to the goods which it purchases is well settled. Nobody has a right to represent his goods as the goods of somebody else. Nobody has a right to make any false, misleading or deceptive representations as to his goods. It is not necessary that an express representation be made. It is sufficient if the goods are marked in such a way as to result, or if the failure to label them, results in the public's being deceived or misled.

In **Federal Trade Commission v. Algoma Lumber Company**, 291 U. S. 67, 78 L. ed. 655, it was held that the marketing of California pine as White pine constitutes a deception and fraud and was an unfair practice in commerce which the Federal Trade Commission was justified in suppressing.

This decision emphasizes the right of the public to get what it chooses although the choice may be dictated by

caprice or by fashion, or even by ignorance. At page 78 (662) this Court said:

> "Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. **The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. Federal Trade Comm'n. v. Royal Milling Co.**, 288 U. S. 212, 216; **Carlsbad v. W. T. Thackeray & Co.** (C. C.), 57 Fed. 18. **In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.**" (Boldface ours.)

In **Elgin National Watch Co. v. Illinois Watch Case Co.**, 179 U. S. 665, 674, 45 L. ed. 365, 380, Mr. Chief Justice Fuller said:

> "In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, **and the public is entitled to the means of distinguishing between those and other goods;** and protection is accorded against unfair dealing, whether there be a technical trade mark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another." (Boldface ours.)

Of the right of the public to know what it is purchasing, the Court in **Federal Trade Commission v. Royal Milling Company**, 288 U. S. 212, 77 L. ed. 706, stated at page 216 (709):

> "If consumers or dealers prefer to purchase a given article **because it was made by a particular manufacturer or class of manufacturers**, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin." (Boldface ours.)

And at page 217 (709) of the opinion it is stated:

> "The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, **and which they might or might not buy if correctly informed as to its origin.** We are of the opinion that the purchasing public is entitled to be protected **against that species of deception, and that its interest in such protection is specific and substantial.**" (Boldface ours.)

In **Prince Mfg. Co. v. Prince's Metallic Paint Co.**, 135 N. Y. 24, 17 L. R. A. 129, an injunction to protect a trademark was refused by reason of a false representation as to the place from which the ore was obtained and the New York Court of Appeals used the following language:

> "Any material misrepresentation **in a label** or trademark **as to the person by whom the article is manufactured, or as to the place where manufactured,** or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not in such cases, take into consideration the attitude of the defendant. * * * And, although the false article is as good as the true one, 'the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce.'" (Boldface ours.)

A number of California cases are cited by the petitioner in support of its contention that the state may not require the labeling of prison-made goods. It is to be observed, however, that a later case decided by the Supreme Court of California in October, 1932, is not included in the list of cases relied upon. **In re Bear**, 15 Pac. (2d) 489, 83 A. L. R. 1402. In this case Bear, who was a manufacturer of meringue powders, using egg products from without the United States, was arrested for failure to comply with an act of the California Legislature requiring that each pack-

age of his manufactured commodity be stamped with the information that imported eggs were used in its production. It was contended by Bear, as it is similarly contended here with respect to prison-made goods, that the dried eggs or egg powders used by him were pure, and fit for human consumption and that they had been inspected by Federal officials and imported under the laws of the United States, and therefore, the California act was unconstitutional.

In its decision the California Court quoted with approval the language of the Supreme Court of Washington in **Parrott & Company v. Benson**, 114 Wash. 117, 194 P. 986, where it was stated:

> "Surely when an egg reaches a restaurant, hotel, or bakery and is taken from the package, cooked or mixed with other ingredients, and served to the guest or purchaser as food, it requires no argument or authority to establish beyond cavil that it is no longer an article of foreign commerce over which Congress alone has control; otherwise no article once brought from without into the state, no matter how changed by any conceivable process, could ever become subject to state legislation; but authorities are as numerous as the question is simple."

And in commenting upon the case of **In re Foley** relied upon by the petitioner, the Court said:

> "In re Foley, 172 Cal. 744, 158 P. 1034, Ann. Cas. 1918A, 180, held invalid a statute requiring each imported egg to be stamped, without making any general provision for inspection, or regulating the sale of eggs of inferior quality. The court was of the opinion that the excessively burdensome requirement accomplished no legitimate object. **The opinion recognized, however, that a statute properly framed could validly regulate the sale of imported eggs, and this is undoubtedly the law, as the cases cited above demonstrate.** The provisions of the statute involved herein

> are not too burdensome, and, coupled with the general plan of inspection, they tend to protect the individual consumer against deception." (Boldface ours.)

We conclude, therefore, that if the legislature is of the belief that the interests of the general welfare are best served by requiring only that convict-made goods be labelled, rather than prohibiting their sale altogether, it has the right and power to make such requirement. And in view of the **Hawes-Cooper** Act the state may enforce the provisions of such a statute against the importer.

III.

CONGRESS IN THE REGULATION OF INTERSTATE COMMERCE HAS, WHEN NECESSARY, ACTED TO GIVE FORCE TO VALID STATE LAWS, AND SUCH ACTS HAVE BEEN CONSISTENTLY UPHELD BY THIS COURT.

That Congress possesses supreme authority to regulate interstate commerce, subject only to the limitations of the Constitution, is too well established to require the citation of the numerous cases in this court which have so held. It is also just as well established that "in some circumstances regulation may properly take the form of and have the effect of prohibition." **Northern Securities Company v. United States**, 193 U. S. 197, 335, 48 L. ed. 679, 699.

And as this court said in **United States v. Hill**, 248 U. S. 420, 425, 63 L. Ed. 337, 340:

> "Congress may exercise this authority **in aid of the policy of the state** if it sees fit to do so."

This principle is neither new in theory, nor recent in practice, but has always been recognized by the Congress and approved by the Courts.

By an act approved June 5, 1794 (1 Stat. 378), the Third Congress made provision for the laying of duties and licenses for selling wines and foreign liquors by retail, and requiring that retail dealers in such commodities obtain licenses. This statute provided "that no license shall be granted to any person to sell wines, or foreign distilled spirituous liquors, **who is prohibited to sell the same by the laws of any state.**" (Boldface ours.)

An act of February 25, 1799 (1 Stat. 619), required that United States officers observe quarantines and other restraints established by any state respecting vessels arriving in, or bound to, any port or district thereof, thus assisting in the carrying out of state laws.

The Thirteenth Congress by an act of August 2, 1813 (3 Stat. 72), defined retailers in imported goods, wares or merchandise, as well as in wines and liquors, and required that every retailer of such commodities obtain a license from the collector appointed by virtue of the act. This statute provided also "that no license shall be granted to any person to sell wines, distilled spirituous liquors, **or merchandise**, as aforesaid **who is prohibited to sell the same by any state.**" (Boldface ours.)

An act approved March 3, 1825, (4 Stat. 115), provided for the punishment in accordance with the laws of the state in which the place is situated, of offenses committed in places under the jurisdiction of the United States, where the offense was not theretofore punishable by the Courts of the United States.

By an act approved July 3, 1866 (14 Stat. 82), regulations were made by the Congress for the transportation of explosives. Among other provisions of the statute was one that the regulation so made should not be construed as to prevent any state from prohibiting or regulating the traffic in, or transportation of, such explosives, or from pro-

hibiting the introduction thereof into the state for sale, use or consumption therein.

Thus, it has been recognized from the very foundation of the government that:

> "The state possesses the power to prescribe all such regulations with respect **to the possession, use, and sale of property** within its limits as may be necessary to protect the health, lives, and morals of its people; **and that power may be applied to all kinds of property, even that which in its nature is harmless.**"
>
> **Bowman v. Railway Company,** 125 U. S. 465, 501, 31 L. ed. 700, 712. (Boldface ours.)

And the policy of the National Government, as demonstrated by these acts has been to **lend the force of its regulatory powers in support of the effective operation of state laws in matters affecting the welfare of the citizens of the several states.**

This policy has always been sustained by this court whenever called into question. Indeed, it would appear that the court has in certain instances, suggested this method of cooperation between the federal and state governments. In the case of **Robbins v. Shelby County Taxing District,** 120 U. S. 489, 30 L. ed. 694, involving a Tennessee statute prohibiting the sale by drummers and other persons not having a regular licensed place of business within the taxing district, **of goods, wares and merchandise,** by sample, except upon payment of a privilege tax, it was said by the Court:

> "If the selling of goods by sample and the employment of drummers for that purpose, **injuriously affect the local interest of the states, Congress,** if applied to, **will undoubtedly make such reasonable regulations as the case may demand.**" P. 498 (698). (Boldface ours.)

In the case of **Leisy v. Hardin,** 135 U. S. 100, 34 L. ed. 128, it was said that:

"Undoubtedly it is for the legislative branch of the state governments to determine **whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, * * * the responsibility is upon Congress**, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." P. 123-124 (137). (Boldface ours.)

* * * * * * *

And the court concluded:

"Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in **Gibbons v. Ogden**, 9 Wheat. 1, 238, 6 L. ed. 23, 80, in **'a frank and candid cooperation for the general good.'**" (Boldface ours.)

The same idea was expressed in **Lyng v. State**, 135 U. S. 161, 34 L. ed. 152. In this case the Court said:

"The same rule that applies to * * * the products * * * of any state, applies to **all commodities** in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts, and the usages of the commercial world. **It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances.**" P. 167 (153). (Boldface ours.)

And in **Schollenberger v. Pennsylvania**, 171 U. S. 1, 43 L. ed. 49, involving oleomargarine, Mr. Justice Peckham stated for the court:

> "**In the absence of Congressional legislation**, therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state." P. 23 (57). (Boldface ours.)

It may be observed that in these opinions the court referred consistently to "articles of commerce," "articles of trade" and the "transportation of commodities," and not merely articles which in and of themselves are inherently harmful.

These repeated and emphatic assertions of this court, even before the issue was squarely presented to it, and the decisions of this court hereinafter discussed, we submit, unmistakably establish the right of Congress to make the regulation involved in this case.

IV.

ABSOLUTE PROHIBITION OF AN ARTICLE OF COMMERCE MAY BE PROVIDED WHEN NECESSARY TO PREVENT THE SPREAD OF AN EVIL.

The contention of petitioner that the power of Congress to regulate interstate commerce by prohibiting the interstate transportation of particular commodities is dependent upon the inherently evil or harmful character of the commodity, is wholly without substance. It is urged by petitioner that since the articles here are not of an inherently harmful nature, the Court may not look to the evils resulting from their interstate transportation and sale in violation of state laws, and in competition with free labor and private industry. This view is not sustained by the decisions.

It was said by this Court in the **Whitfield case, supra,** that:

> "The view of the State of Ohio that the **sale** of convict-made goods in competition with the products of

free labor **is an evil**, finds ample support **in fact** and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize **the evil.** In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. C. 497, Sec. 307, 46 Stat. 689; Title 19 U. S. C. (1934 ed.), Sec. 1307. And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. C. 340, Sec. 5, 46 Stat. 391; Title 18 U. S. C. (1934 ed.), Sec. 744C." (Boldface ours.)

This court has recognized in a long line of decisions that regulation as to articles, the use or disposition of which is an evil that has been prohibited by a number of the states, can only be accomplished by absolutely prohibiting the interstate transportation of such articles. One of the cases illustrating the application of this principle is **Champion v. Ames**, 188 U. S. 321, 47 L. ed. 492, which sustained an act of Congress prohibiting the importation into the United States or the transportation from one state to any other state of "**any paper, certificate or instrument**" purporting to be or represent a lottery ticket. The Supreme Court in sustaining this statute stated:

"We are of opinion that **lottery tickets are subjects of traffic**, and therefore are subjects of commerce, **and the regulation of the carriage of such tickets from state to state**, at least by independent carriers, **is a regulation of commerce among the several states.**" P. 354 (500).

"If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, **for the protection of the people**

> **of all the states**, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?'' P. 355 (501). (Boldface ours.)

We emphasize that the court did not base its decision upon the ground that the ''paper, certificate or instrument' was of an **inherently harmful** nature. In fact such article in itself is no more harmful than the articles involved in this case. The decision was based upon the fact that many states of the union had recognized ''**the evils** that inhere in the raising of money in that mode,'' and therefore, the action of Congress

> ''**only supplemented the action of those states**—perhaps all of them—**which** for the protection of the public morals, **prohibit** the drawing of lotteries, as well as **the sale or circulation of lottery tickets**, within their respective limits. **It said**, in effect **that it would not permit the declared policy of the states**, which sought to protect their people against the mischiefs of the lottery business, **to be overthrown or disregarded by the agency of interstate commerce.** We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy by legislation, the whole field of interstate commerce.'' P. 357, 358, (502). (Boldface ours.)

Exactly the same situation exists here. Most of the States have enacted legislation prohibiting the sale of prison-made goods, or requiring that they be labelled when sold, and by the adoption of the **Ashurst-Sumners** Act the Congress has sought to prevent the declared policy of those states from being overthrown or disregarded by the agency of interstate commerce.

The Congress has enacted a statute entirely **prohibiting** the transportation of stolen motor vehicles in interstate or foreign commerce. That act was sustained by the court in **Brooks v. United States**, 267 U. S. 432, 69 L. ed. 699, although a stolen automobile is not in itself more inherently harmful than one not stolen. It is the transportation and sale in interstate commerce of stolen automobiles, just as it is the transportation and sale in interstate commerce of prison made goods in states restricting such sale, that causes the evil. Mr. Chief Justice Taft, speaking for the court in that case, stated that:

> "Congress can certainly regulate interstate commerce to the extent of **forbidding** and punishing **the use of such commerce** as an agency to promote immorality, dishonesty, or the **spread of any evil, or harm to the people of other states from the state of origin.**" P. 436 (701). (Boldface ours.)

So, since the sale of convict-made goods in competition with the products of free labor is an evil, recognized as such by the Congress, a preponderant number of the legislatures of the forty-eight states, and by the courts, the prohibition of interstate commerce in such goods may be justified by the application of the principle enunciated in that case.

In 1912 Congress exercised its powers to regulate interstate commerce by the passage of the act of July 31, 1912 (37 Stat. 240, U. S. C. A., Title 18, Sec. 405), which act, without reference to whether the several states regulated or prohibited the showing of prize fight films, expressly prohibited the importation into the United States and the transportation in interstate commerce of such films. This court, in the case of **Weber v. Freed**, 239 U. S. 325, 60 L. ed. 308, upheld the constitutionality of that act. Although the court was there concerned with a case of importation

of a prize fight film from a foreign country, the courts throughout the country have considered the **Weber** case as dispositive of all questions of constitutionality of that act. See **United States v. Johnston**, 232 Fed. 970, and **Rose v. St. Clair**, 28 Fed. (2d) 189, both cases relating to transportation of prize fight films in interstate commerce. It is respectfully but emphatically submitted that if Congress may prohibit the importation of prize fight films from another state, into a state which permits the showing of such films, it assuredly may not be contended that Congress is without power to prohibit the transportation of prison-made goods into a state which prohibits their sale.

In the case of **Hippolite Egg Co. v. United States**, 220 U. S. 45, 55 L. ed. 364, it was held to be within the regulatory power of Congress to **prohibit** the transportation in interstate commerce of adulterated **or misbranded** articles of food. This legislation was supplementary to legislation which had been enacted in many of the states prohibiting the sale of such adulterated or misbranded articles.

In the case of **Hoke v. United States**, 227 U. S. 308, 57 L. ed. 523, the prohibition by congressional enactment of the transportation in interstate commerce of women and girls for immoral purposes was sustained as a valid exercise of the power vested in Congress to regulate commerce among the states. This statute was in aid of the enforcement of state laws forbidding prostitution, and the same argument was urged against its validity that is being asserted here—that it was an unconstitutional invasion of the rights reserved to the states. But it was pointed out by this court that:

> "There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the

states cannot reach and over which Congress alone has power; **and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality.** Its exertion does not encroach upon the jurisdiction of the states." P. 321 (527). (Boldface ours.)

* * * * * * *

"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and **the powers** reserved to the states and those **conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.**" P. 322 (527). (Boldface ours.)

* * * * * * *

"Motives executed by actions may make it the concern of government to exert its powers. **Right purpose and fair trading need no restrictive regulation, but let them be transgressed, and penalties and prohibition must be applied.** We may illustrate again by the pure food and drug act. **Let an article * * * be misrepresented by false branding**, and Congress may exercise its prohibitive power." P. 322 (527). (Boldface ours.)

Again, we submit, the same principle is involved here as was involved in that case. In the exercise of their control over prison-made goods the states may make the sale of such goods within their jurisdiction a crime. But there is a domain over which Congress alone has exclusive power, and if this power be invoked to prevent what the states cannot, it is an argument for—not against—its validity.

The Congress has prohibited the larceny of goods or chattels moving as, or which are a part of an interstate or foreign shipment, or the receipt or possession of such goods, knowing them to have been stolen. The same statute pro-

hibits the interstate transportation of goods or chattels, knowing them to have been stolen. (47 Stat. 773, Sec. 409, Title 18, U. S. C. A.). Convictions under this Act have been sustained by the Courts. **Goldstein v. United States** (C. C. A. Cal.), 73 F. (2nd) 804; **Cherry v. United States** (C. C. A. Ill.), 78 F. (2nd) 334.

It has been made unlawful to transport or aid in the transportation in interstate commerce of kidnapped persons. (48 Stat. 781, Sec. 408a, Title 18, U. S. C. A.). A conviction under this Act has been upheld. **Gooch v. United States** (C. C. A. Okla.), 82 F. (2nd) 534, Certiorari denied, 56 S. Ct. Rep. 683, 80 L. ed. Adv. Opp. 674.

The Congress has **prohibited** the movement or travel in interstate commerce of any person, with the intent to avoid prosecution for murder, kidnapping, burglary, robbery and other offenses. (48 Stat. 782, Sec. 408e, Title 18, U. S. C. A.)

It would seem to be just as much within the power of the Congress to prohibit the interstate transportation of **any article** to be used for the purpose of violating a state law, as it is to prohibit the transportation of an article, being the instrument through which a state law has theretofore been violated. We submit there can be no difference in principle.

V.

THE EXTENT TO WHICH A POWER OF CONGRESS TO REGULATE MAY BE EXERCISED, IS WITHIN THE DISCRETION OF CONGRESS.

There are many instances where the Congress has exercised its regulatory powers over interstate commerce to a lesser degree than by absolute prohibition of such commerce in the subjects regulated, and these acts have always been sustained.

Illustration of this type of regulation is to be noted in the

Wilson Act (26 Stat. 313), providing that intoxicating liquors transported from one state to another and remaining therein for use, consumption, sale or storage, shall upon arrival in such state be subject to the operation and effect of the laws of the same, to the same extent and in the same manner as though such liquors had been produced therein, whether introduced in the original package or otherwise. This statute was sustained in **Wilkerson v. Rahrer (In re Rahrer)**, 140 U. S. 545, 35 L. ed. 572, in which it was said by Mr. Chief Justice Fuller on behalf of the court:

> "And **this court has uniformly recognized state legislation, legitimately for police purposes**, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government." P. 554 (574). (Boldface ours.)

It was stated by the court that the adoption of the Constitution placed in the Congress the power to prevent the enactment by the states of commercial regulations discriminatory in character or detrimental to the common interests. But

> "this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the State, or to grant a power not possessed by the States, or to adopt State laws. **It has taken its own course and made its own regulation applying to these subjects of interstate commerce one common rule whose uniformity is not affected by variations in State laws in dealing with such property.**" P. 561 (576). (Boldface ours.)

Further example may be found in the **Lacey Act** (31 Stat. 187), making unlawful the transportation to any other state

of the dead bodies of any game animals or birds which have been killed or shipped in violation of the laws of the state in which they were killed or shipped. The same act provides that the dead bodies of game animals or birds transported from one state into another for use, consumption or sale therein, shall be subject to the operation and effect of the laws of the state of destination, to the same extent and in the same manner as if such animals or birds had been produced in such state.

This statute, as was pointed out by the court, **relates to wholesome articles of food**—articles which were not inherently harmful—and have been sustained in many cases.

New York, ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75;

LaCoste v. Department of Conservation of State of Louisiana, 263 U. S. 545, 68 L. ed. 437;

Rupert v. United States, 181 Fed. 87;

State v. Heger, 194 Mo. 707, 83 S. W. 252.

The **Webb-Kenyon** Act (37 Stat. 699), which prohibits the transportation of intoxicating liquors into states, where the same were "intended to be received, possessed, sold, or in any manner used either in the original package or otherwise, in violation of any law of such state," was sustained in the case of **James Clark Distilling Company v. Western Maryland Ry. Co.**, 242 U. S. 311, 61 L. ed. 332.

Section 1 of the Act under consideration here is almost an exact copy of the Act involved in that case, and the argument advanced there was in substance the same as that made by the petitioner here. The Court disposed of it by saying:

> "Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress, in adopting a regulation, had considered the nature

and character of our dual system of government, state and nation, and instead of absolutely prohibiting, has so conformed its regulation as to produce cooperation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads **concerns a subject as to which both state and nation, in their respective spheres of authority**, possessed the supremest authority before the action of Congress which is complained of; and hence **the argument virtually comes to the assertion that, in some undisclosed way, by the exertion of congressional authority, power possessed has evaported.**" P. 331, (340-341). (Boldface ours.)

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"The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, **but the will** which causes the prohibitions to be applicable **is that of Congress**, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. P. 326, (338). (Boldface ours.)

* * * * * * *

"So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the states—so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself." P. 326-327, (339).

The court in its opinion was careful to point out to those who expressed the fear that to sustain the act might lay the

basis for subjecting interstate commerce in all articles to state control, **that such regulation might not be made except as to those articles over which the states and the nation, within the scope of their jurisdiction, possessed an undisputed right of control.** Said the court:

> "Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the **principle** which, after all, dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the Constitution **but for the enlarged right possessed by government** to regulate liquor, **has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied.** In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace." P. 332 (341). (Boldface ours.)

We submit that this Court has already determined that the sale of prison-made goods is a business of such a nature as to justify the exercise of governmental authority over it to the extent that states may prohibit it altogether. Can it be said that the Congress is powerless to adopt regula-

tions "to minimize the evil resulting from violating prohibition of state law" by sending such articles "through interstate commerce into a state" and selling them in violation of such laws? We submit that the very statement of the question exposes the fallacy of the whole argument of the petitioner. The **Clark Distilling Company case**, therefore, is conclusive as to the constitutionality of the **Ashurst-Summers** Act.

Surely liquor, the sale of which was then thought to be so injurious to the welfare of the states that most of them had prohibited it, is no more exceptional, so far as the scope of governmental control over it is concerned, than the sale on the open market of prison-made goods, which thirty states have declared is injurious and disastrous to the general welfare of their citizens. Fine distinctions cannot and may not be drawn to the effect that things which injure the physical or moral welfare are more exceptional in their nature than things which from a social and economic standpoint, are detrimental to the prosperity and welfare of the state and destructive of the peace and good order of the people. Each must be on an equal footing—each is vital to the general welfare.

But in each of these instances, whether the regulation of interstate commerce in specific articles took the form of prohibition of transportation, or whether the regulation merely prescribed the regular means for accomplishing the introduction and incorporation of the articles mentioned into and with the mass of property in the state, or whether the regulation simply prohibited transportation into states where the articles mentioned were to be used in violation of state laws, or prohibited transportation into other states of articles taken in violation of the laws of the state or origin, **the articles regulated, while not necessarily harmful in themselves, were of a sort, or the effect of their use was such, as to give both state and nation**, within the respective

spheres of their authority, **supreme power over them. The test of the power is found, not in the inherent nature of the articles themselves, but in the effect the business of dealing in such articles has upon the public weal. State v. Clausen,** 65 Wash., 156, 117, Pac., 1101, 37 L. R. A. (N. S.), 466.

That principle was well stated by this Court in **Hebe Company v. Shaw,** 248 U. S. 297, 303, 63 L. ed. 255, 259, when it said:

> "If the character or **effect of the articles as intended to be used** 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.'" (Boldface ours.)

It may be reiterated that each of these Congressional enactments was in aid of the enforcement of local policies of the states, enacted in the exercise of their undisputed right to prohibit, within the limits of their authority, the use of such articles in a manner inimical to the general welfare—material or moral.

VI.

THE CHILD LABOR CASE SUPPORTS THE CONSTITUTIONALITY OF THE ASHURST-SUMNERS ACT.

The petitioner herein relies upon the decision in the **Child Labor** case, **Hammer v. Dagenhart,** 247 U. S. 251, 62 L. ed. 1101 as authority for the assertion that the regulation provided in this act may not be made. The statute under attack in that case had no similarity in meaning or effect to the one under consideration here, and in the light of the construction which had previously been made of the language used in the **Ashurst-Sumners** Act, it cannot be contended that the decision in the **Child Labor** case is controlling.

Such a clear distinction exists between the **Child Labor** statute and the one under consideration here that it would seem to require no argument to demonstrate it. The **Child Labor** statute was declared to be unconstitutional on the ground that the prohibition of interstate transportation of products manufactured by child labor constituted an attempt to coerce the **manufacture of commodities in accordance with regulations and standards prescribed by the Congress**, regardless of the laws regulating the labor of children in either the state of origin or destination. The present statute, as we have pointed out is a regulation of interstate commerce in prison-made goods, and is intended to prevent **the evils inherent**, not in the manufacture of the articles, but **in the sale of such goods in violation of the laws of those states which have prohibited it.**

We submit that this court in the **Child Labor** case reaffirmed the doctrine upon which regulations by the Congress similar to that here under attack had previously been sustained, and those principles absolutely support this legislation.

It was urged by the government in that case that adjudicated cases established the doctrine that the power given to Congress to regulate commerce incidently included the authority to prohibit the movement in interstate commerce of ordinary commodities. But the court said that the decisions rested "upon the **character of the particular subjects dealt with and the fact that the scope of governmental authority, state or nation, possessed over them**" is such that the regulation made in each instance was justified. **Hammer v. Dagenhart, supra**, P. 270, (1105). (Boldface ours.)

And further:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control

> the states in their exercise of the police power over local trade and manufacture." P. 273, 274, (1106).
>
> * * * * * * *
>
> "The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution." P. 275, (1107).

As has been shown, thirty states have already exercised their police power over the manufacture and traffic in prison-made goods—matters purely local. The Court nowhere in the opinion in that case used language which justifies the contention that the Congress may not prohibit the interstate transportation of any article, the use or sale of which results in evil consequences. On the contrary, the court restated and emphasized the very principle which we are urging here, when it said of those federal statutes prohibiting interstate transportation:

> "In each of these instances **the use of interstate transportation was necessary to the accomplishment of harmful results.** In other words, although the power over interstate transportation was to regulate, that could only be accomplished **by prohibiting the use of the facilities of interstate commerce to effect the evil intended.**" P. 271 (1105). (Boldface ours.)

The law here is not an invasion of state sovereignty as was the **Child Labor** Act, but is in support of state rights and state authority.

And we earnestly submit that upon the authority of the decision in the **Child Labor** case, the Congress would be entirely justified in absolutely prohibiting the interstate transportation of prison-made goods if necessary to the maintenance of the authority of the states in the enforcement of state laws relating to their sale.

Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. **Chicago, B. & Q. R. Co. v. McGuire,** 219 U. S. 549, 569, 55 L. ed. 328, 339; **Chicago, R. I. & P. R. Co. v. Perry,** 259 U. S. 548, 556, 66 L. ed. 1056, 1061; **German Alliance Ins. Co. v. Lewis,** 233 U. S. 389, 414, 58 L. ed. 1011, 1022.

It is sufficient to say that Congress, in its judgment, has attempted to cooperate in the prevention of an evil which thirty states have sought to control.

VII.

ORIGIN OF COMMODITIES DOES NOT EXEMPT INTERSTATE COMMERCE IN THEM FROM REGULATION BY CONGRESS.

It is urged by the petitioner that the statute under consideration here is aimed at the method of production of the articles and that since Congress has no power to regulate this, it follows that the transportation and sale of such articles may not be subjected to the regulation prescribed here. This contention has no basis in fact, and the conclusion has no support in reason or in authority. It would not be suggested that the **Webb-Kenyon** Act was enacted to regulate the manufacture of intoxicating beverages, yet there the power of Congress to regulate interstate commerce in a commodity the nature of which was such that the state might regulate its manufacture and sale, was upheld by this court.

The Congress is not to be denied the power to protect

navigation on all waterways of the United States against unreasonable obstructions, even though such obstructions were created under sanction of a state. And whether the obstruction is unreasonable is to be determined by the Congress. **Union Bridge Co. v. United States**, 204 U. S., 364, 401, 51 L. ed. 523, 539. It may prevent a conspiracy to obstruct interstate transportation of hats from a state to the various places of their destination, "although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and, some of them were in themselves, as a part of their obvious purpose and effect, beyond the scope of federal authority."

Loewe v. Lawlor, 208 U. S., 274, 301, 52 L. ed. 488, 502.

And the Congress may prohibit the payment, by advertising, for interstate travel although payment in this manner is expressly authorized by state law.

Chicago, I. and L. Ry. Co. v. United States, 219 U. S. 486, 496, 55 L. ed. 305, 309.

While the Congress may not make it unlawful to misbrand articles of food, it is a legitimate exertion of the power of Congress to regulate interstate commerce to make it unlawful to ship or deliver for shipment from one state to another an article of food which is misbranded.

Weeks v. United States, 245 U. S. 618, 622, 62 L. ed. 513, 515.

The argument that the control of the states over manufacture prevented Congress from exercising its power to regulate commerce was urged in the case of **Standard Oil Company v. United States**, 221 U. S. 1, 68, 69, 55 L. ed. 619, 648. In referring to this contention it was stated by the court:

> "So far as the objections of the appellants are concerned, they are all embraced under two headings:

"a. That the act, even if the averments of the bill be true, cannot be constitutionally applied because to do so would extend the power of Congress to subjects **dehors** the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states. But all the structure upon which this argument proceeds is based upon the decision in **United States v. E. C. Knight Co.**, 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the anti-trust act, and have been so necessarily and expressly decided to be unsound, as to cause the contentions to be plainly foreclosed and to require no express notice."

VIII.

THE LANGUAGE OF THE ASHURST-SUMNERS ACT HAS BEEN CONSTRUED TO BE A PROPER REGULATION OF INTERSTATE COMMERCE.

It is contended by the petitioner that the **Ashurst-Sumners** Act is in effect a prohibition of interstate commerce with purposes similar to those of the **Child Labor** Act and is therefore invalid; or that it is a delegation to the respective states of the power invested in the Congress to regulate commerce, and is invalid on that ground. This contention is wholly without merit. The act is upon its face a regulation—not a prohibition of commerce, nor a delegation of power.

It is settled by an abundance of authority that in adopting the language used in an earlier act, Congress must be considered to have adopted also the construction which had been previously given to such language by the courts and

to have used it according to that interpretation which is known and established.

Hecht v. Malley, 256 U. S. 144, 68 L. ed. 949;

Sessions v. Romadka, 145 U. S. 29, 43, 36 L. ed. 609, 614;

Latimer v. United States, 223 U. S. 501, 604, 56 L. ed. 526, 527.

The language of the **Hawes-Cooper** Act is identical, except as to the commodity involved, with the **Wilson** Act, the **Lacey** Act, and the **Oleomargarine** Act.

The language of the **Ashurst-Sumners** Act is in substance the same as the **Webb-Kenyon** Act.

Both the **Wilson** Act and the **Webb-Kenyon** Act have been construed so many times that their meaning is no longer in doubt. The **Hawes-Cooper** Act has now been construed, the court following the construction previously given to the **Wilson** Act.

It was said in the **Rahrer case, supra**, that:

> "It does not admit of argument that Congress can neither delegate its own powers, nor enlarge those of a state." P. 560 (576).

But that in adopting the **Wilson** Act the Congress,

> "has not attempted to delegate the power to regulate commerce or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule whose uniformity is not affected by variations in state laws in dealing with such property." P. 561 (576).

And so in the **Whitfield case, supra** this Court said of the **Hawes-Cooper Act**:

> "That act is in substance the same as the Wilson Act with respect to intoxicating liquors, passed August 8,

1890, c. 728, 26 Stat. 313, as construed and upheld by this Court. **Rhodes v. Iowa**, 170 U. S. 412, 421-423, 426; **In re Rahrer**, 140 U. S. 545, 559-560, 562, 564."

* * * * * * * *

"If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods **must be upheld for reasons akin to those which moved this Court to sustain the validity of the Wilson Act.**" (Boldface ours.)

* * * * * * * *

"3. That the Hawes-Cooper Act does not constitute a delegation of congressional power to the States is made clear by **In re Rahrer, supra**, pp. 560-561, and by what we have already said under subdivision 2."

In the **Clark Distilling Company case, supra**, upholding the validity of the **Webb-Kenyon Act**, the court in construing it to be a proper regulation of commerce, said:

"As we have already pointed out, the very **regulation made by Congress in enacting the Wilson Law** to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state, and selling it in violation of such law, was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained." P. 330, (340). (Boldface ours.)

* * * * * * * *

"As the power to **regulate which was manifested in the Wilson Act, and that which was exerted in enacting**

> **the Webb-Kenyon Law, are essentially identical,** the one being but a larger degree of exertion of the identical power which was brought into play in the other, **we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity,**—a result which, as we have previously said, would reverse **Leisy v. Hardin** and overthrow the many adjudications of this court sustaining the Wilson Act'' P. 330 (340). (Boldface ours.)

This act has been before the Supreme Court in many cases since that time, involving in some instances the transportation of non-intoxicating malt liquors, the sale of which were prohibited by State statutes, and the meaning of the language announced in the **Clark** case had become firmly established at the time of the enactment of the act in question here. **United States v. Hill, supra; McCormick & Co. v. Brown,** 286 U. S. 131, 76 L. ed. 522.

We submit therefore that the decision of this Court in the **Whitfield** case, and the decision in the **Clark Distilling Company** case are conclusive as to the validity of the **Ashurst-Sumners** Act.

IX.

POWER OF CONGRESS TO REQUIRE MARKING PACKAGES TRANSPORTED IN INTERSTATE COMMERCE NO LONGER OPEN QUESTION.

Section 2 of the Act here requires that all packages containing any convict-made goods when transported in interstate commerce be plainly marked showing the name and address of the shipper, the nature of the contents, and the name and location of the penal or reformatory institution where produced. But it is urged by appellant that the Con-

gress does not have power to require that shipments of convict-made goods be marked as required by the Act.

The language of this section follows very closely the language found in Section 393, Title 18, U. S. C. A. (31 Stat. 188), which relates to packages containing the dead bodies of game animals and birds, when transported in interstate commerce, and the constitutionality of which has been determined. **Rupert v. United States, supra; LaCoste v. Department of Conservation of State of Louisiana, supra.**

A similar statute relating to the marking of packages shipped in interstate commerce and containing intoxicating liquors (Sec. 390, Title 18, U. S. C. A.), has also been sustained. **United States v. Freeman**, 239 U. S. 117, 60 L. ed. 172; **One Truck Load of Whisky v. United States** (C. C. A. Ohio), 247 Fed. 99.

We take it, to be settled, therefore, that the Congress may make the regulation provided in Section 2 of the **Ashurst-Sumners Act.**

X.

THE ACT VIOLATES NEITHER THE FIFTH OR TENTH AMENDMENTS TO THE CONSTITUTION.

It is contended by the petitioner that the right to do business, the right to own property, and to use it and sell it free of restrictions which would impair its sale value or its enjoyment, is "property" which is protected against national action by the due process clause of the Fifth Amendment, just as it is protected against state action by the Fourteenth Amendment. It is asserted, therefore, that no restrictions or burdens may be placed upon property except that which is of an inherently harmful nature.

We submit that the decisions do not support this proposition, as we have heretofore demonstrated. All property of

whatsoever kind or nature is held subject to the right of the state, within its jurisdiction, or the national government, within the scope of its authority, to enact such regulations and restraints upon its use as may be necessary to preserve and promote what the prevailing opinion deems to be the public welfare. No decision can be cited which affirms the right to do business in violation of valid state laws. In fact, all the decisions are to the opposite effect.

As was stated by Mr. Justice McKenna in **Rast v. Van Deman & Lewis Co.**, 240 U. S. 342, 357, 60 L. ed. 679, 687;

> "It is the duty and function of the Legislature to discern and correct evils, and by evils we do not mean some definite injury, **but obstacles to a greater public welfare. Eubank v. Richmond**, 226 U. S. 137, 142, 57 L. ed. 156, 158; **Sligh v. Kirkwood**, 237 U. S. 52, 59 L. ed. 835, 837." (Boldface ours.)

It was stated by the Supreme Court of Washington in the case of **State v. Clausen, supra,** that under the police power a state might,

> "regulate and control and prohibit any industry, **however innocent it may have been in its inception,** whenever it becomes a menace to the employees engaged in it, the people surrounding it, **or to any considerable number of people at large,** no matter from whatsoever cause the menace may arise." (Boldface ours.)

It has been said by the Supreme Court of Ohio, in **Phillips v. State**, 77 Ohio St. 214, 82 N. E. 1064, that:

> "It is almost an axiom that anything which is reasonable and necessary to secure the peace, safety, morals, and **best interests of the commonwealth** may be done under the police power; and this implies that **private rights exist subject to the public welfare.**" (Boldface ours.)

So in **Boston Beer Co. v. Massachusetts**, 97 U. S. 25, 24 L. ed. 989, it was said:

> "If the public safety or the public morals require the discontinuance of **any** manufacture or **traffic**, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer." P. 32 (992).

In **Mugler v. Kansas**, 123 U. S. 623, 31 L. ed. 205, Mr. Justice Harlan stated:

> "No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare." P. 663 (211).

Therefore, when a business becomes prejudicial to the public welfare, or becomes a menace to any considerable number of people at large, it may be prohibited. In **Murphy v. California**, 225 U. S. 623, 56 L. ed. 1229, Mr. Justice Lamar stated:

> "The Fourteenth Amendment * * * does not prevent legislation intended to regulate useful occupations which, because of their nature * * * may prove injurious or offensive to the public." P. 628 (1232).

And the "regulation or prohibition need not be postponed until the evil has become flagrant." P. 629 (1232).

The business of selling stock on margin or for future delivery may be prohibited. **Otis v. Parker**, 187 U. S. 606, 47 L. ed. 323. In that case it was said:

> "If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction **not in itself necessarily objectionable**, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'" P. 609, 327. (Boldface ours.)

And in **Hannibal & St. Joseph R. Co. v. Husen**, 95 U. S. 465, 24 L. ed. 527, it was stated:

> "It may also be admitted that the police powers of a state justify the adoption of precautionary measures against social evils." P. 471 (530).

And in the very recent case of **Nebbia v. New York**, 291 U. S. 502, 78 L. ed. 940, Mr. Justice Roberts, for the court, reaffirmed these principles. He said:

> "Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government." P. 524 (949).
>
> "The Court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community." P. 525 (950).
>
> * * * * * * * *
>
> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business or to pursue a calling may be conditioned." P. 527-528 (951-952).
>
> * * * * * * *
>
> "So far as the requirement of due process is concerned, * * * a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared, by the Legislature to override it." P. 537 (957).

And further:

> "The Constitution does not secure to any one liberty to conduct his business in such fashion as to in-

flict injury upon the public at large, or upon any substantial group of the people." P. 539 (958).

Further examples are unnecessary. In general it may be stated that the possession and enjoyment of all rights are held subject to such regulations or prohibitions as are necessary for the public good. And in particular we assert that the business of dealing in prison-made goods is inherently subject to legislative control, and no such vested right in the business exists as will prevent the legislature from withdrawing the right to deal in such goods from those who previously enjoyed it. **Boston Beer Company v. Massachusetts, supra; Tracy v. Ginzberg**, 205 U. S. 170, 51 L. ed. 755.

The legislature of Kentucky may at its will change the prison system of the state so as to prohibit the manufacture of commodities for sale in the general markets, and the appellant could not be heard to complain that such action deprived it of its property without due process of law, even though its contract with the state for the labor of prisoners has not expired. **Hancock v. Ewing**, 55 Mo. 101; **State v. McCauley**, 15 Cal. 429; **Jones Hollow-Ware Co. v. Crane**, 134 Md. 106.

There is abundant authority for the proposition that the words "due process of law" have the same meaning in the Fifth Amendment within the sphere of federal authority as they do in the Fourteenth Amendment with respect to State legislation. It would seem naturally to follow that if a State may prohibit the sale of prison-made goods without violating the due process clause of the Fourteenth Amendment, the Congress may regulate the interstate transportation of such goods as has been done here, without doing violence to the Fifth Amendment.

If it be seriously urged that the act is inconsistent with

the Tenth Amendment, reserving to the states respectively, or to the people thereof, the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to the Congress. As we have said, it would not be asserted, in view of the decisions, that the **Webb-Kenyon** Act was an attempt upon the part of Congress to regulate the manufacture of liquor in those states where such manufacture was permitted. The construction placed by the courts upon the language of that act precludes any such contention being sustained here.

As was so well stated by the Court below, by this act,

> "there is no attempt to foist or impose a policy on the states. The act is a regulation of commerce among the states but does not invade or interfere with the power of the state to regulate their own internal affairs. It was enacted in aid of the maintenance and enforcement of state laws as was the Webb- Kenyon Act, which was held to be a legitimate exertion of the power to regulate commerce and not to be a delegation of Congressional power to the states" (R. 55).

CONCLUSION.

Counsel for petitioner expresses great concern over what is anticipated will be the result flowing from the effect of this statute. In asserting that if it is sustained it will open the door to federal legislation prohibiting the movement in interstate commerce of articles manufactured by open shop concerns, by the negro and unorganized labor of the south, or of articles manufactured in sweat shops, counsel completely overlooks the very principle upon which this act is based.

To make the cases analogous to the statute attacked here, it must appear that a state may prohibit, and has prohibited,

the sale of articles manufactured by open shop concerns, and that a state has the power to prohibit, and has prohibited, the sale of commodities manufactured by negro or unorganized labor or in sweat shops.

Manifestly, a supplemental federal statute could be regarded as valid **only** if the state law which it is designed to supplement is valid. Such a comparison as is made by the petitioner **assumes** the validity of state statutes prohibiting the sale of products of unorganized, negro or sweat shop labor, and also assumes the **invalidity** of statutes prohibiting the sale of prison-made goods. The first assumption is as grossly erroneous as the second.

The principles upon which the validity of the **Ashurst-Sumners** Act is based are as old as the government itself, and have been firmly established by the decisions of this court. The limitations in their application have been plainly marked. This court has never said, and we apprehend it will never say, that the states and the federal government may not act concurrently, each within the scope of its own power, to suppress an evil so destructive in character as the one which has brought forth this legislation.

The enactment of the **Ashurst-Sumners** law, in aid of "the maintenance of the authority of the states over matters purely local", we submit, was in strict accord with that principle of government enunciated by Mr. Chief Justice Marshall in **Gibbons v. Ogden**, 9 Wheat. 1, 205, 6 L. ed. 23, 72, where he said that Congress acted "in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation ~~which~~ that of the Union and those of the States bear to each other * * * and has, in some measure, adapted its own legislation to this object by making provisions in aid of those of the States." Therefore, this act "must be upheld

for reasons akin to those which moved this court to sustain the validity" of the **Webb-Kenyon** Act.

Respectfully submitted,

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APPENDIX I.

The Ashurst-Sumners Act.

AN ACT to Prohibit the Interstate Transportation of Prison-made Products in Certain Cases.

SEC. 1. It shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

SEC. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

SEC. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

SEC. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act.

APPENDIX II.

The Webb-Kenyon Act.

AN ACT Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

SEC. 1. The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

APPENDIX III.

The Hawes-Cooper Act.

AN ACT To divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases.

SEC. 1. All goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

SEC. 2. This Act shall take effect five years after the date of its approval.

APPENDIX IV.

The Wilson Act.

AN ACT to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases.

SEC. 1. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage

therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.